(12)

No. 84-325

In the Supreme Court of the United States

OCTOBER TERM, 1984

METROPOLITAN LIFE INSURANCE COMPANY, APPELLANT

v.

COMMONWEALTH OF MASSACHUSETTS

On Appeal from the Supreme Judicial Court for the Commonwealth of Massachusetts

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BRIEF FOR APPELLANT

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QUESTION PRESENTED

Whether a state statute that requires insured employee benefit plans to provide specified minimum benefits for certain kinds of medical services is preempted by Section 514(a) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1144(a).*

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* Metropolitan Life Insurance Company and The Travelers Insurance Company were the appellants in the Supreme Judicial Court of Massachusetts. Travelers has also docketed an appeal to this Court (No. 84-356), and the Court has noted probable jurisdiction in that case as well. Travelers' brief on appeal will discuss a question regarding preemption under the National Labor Relations Act, 29 U.S.C. 151 *et seq.* Metropolitan joins in Travelers' arguments concerning the NLRA and incorporates them by reference in this brief.

In accordance with Rule 28.1 of the Rules of this Court, Metropolitan states that, other than wholly-owned subsidiaries, it has only one subsidiary in which it owns a controlling interest of more than 50%. That subsidiary is Dawn Water Company.

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OPINIONS BELOW

The April 1984 opinion of the Supreme Judicial Court of Massachusetts (J.S. App. 1a-8a)[1] is reported at 391 Mass. 730 and 463 N.E.2d 548. The earlier opinion of that court (J.S. App. 13a-34a) is reported at 385 Mass. 598 and 433 N.E.2d 1223. The findings and conclusions of the state trial court (J.S. App. 36a-62a) are not reported. The trial court's opinion on appellee's motion for preliminary injunctive relief (J.S. App. 71a-84a) is not reported.

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[1] "J.S. App." refers to the separately bound appendix to the jurisdictional statements in this case and No. 84-356.

JURISDICTION

The judgment of the Supreme Judicial Court of Massachusetts (J.S. App. 9a) was entered on April 25, 1984. A notice of appeal to this Court (J.S. App. 93a-94a) was filed on May 29, 1984. On July 12, 1984, Justice Brennan extended the time for docketing the appeal to September 22, 1984 (84-325 J.S. Appendix).[2] The appeal was docketed on August 30, 1984. On October 29, 1984, this Court noted probable jurisdiction (A. 474).[3] The jurisdiction of this Court rests on 28 U.S.C. 1257(2).

STATUTORY PROVISIONS INVOLVED

Section 47B of Massachusetts General Laws Chapter 175 and the relevant provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.*, are reprinted in J.S. App. 85a-89a.

STATEMENT

A. Factual Background

In 1974, after extended study, Congress enacted the Employee Retirement Income Security Act ("ERISA") to protect the interests of participants in employee benefit plans and to enable such plans to be administered on a uniform, nationwide basis. To achieve these goals, Congress sought to occupy the regulatory field fully and thereby to eliminate the problems caused by diverse, patchwork state legislation. In Section 514(a) of ERISA, 29 U.S.C. 1144(a), Congress explicitly preempted all state laws that regulate, directly or indirectly, employee benefit plans covered by the federal statute. In unmistakable terms, Section 514(a) provides that the federal law "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan * * *."

[2] The citation refers to the appendix bound together with the jurisdictional statement in this case, No. 84-325.

[3] "A." refers to the joint appendix filed in this Court by the parties in Nos. 84-325 and 84-356.

In 1973, shortly before the enactment of ERISA, but well after congressional consideration of the proposed legislation (including the clauses at issue here) had begun, the Massachusetts legislature passed the "mandated benefit" statute at issue in this case. The state law, Section 47B of Massachusetts General Laws Chapter 175, requires that employee health and welfare plans covering Massachusetts residents provide certain specified minimum benefits for the care of mental and nervous conditions. The law also requires that health insurance policies sold to such plans provide coverage for the same minimum benefits.[4] Section 47B became effective on a mandatory basis on January 1, 1976.[5]

[4] In particular, Section 47B requires that employee benefit plans and health insurance policies satisfy the following minimum requirements (J.S. App. 88a-89a):

> "(a) In the case of benefits based upon confinement as an inpatient in a mental hospital under the direction and supervision of the department of mental health, or in a private mental hospital licensed by the department of mental health, the period of confinement for which benefits shall be payable shall be at least sixty days in any calendar year.
>
> "(b) In the case of benefits based upon confinement as an inpatient in a licensed or accredited general hospital, such benefits shall be no different than for any other illness.
>
> "(c) In the case of outpatient benefits, these shall cover, to the extent of five hundred dollars over a twelve-month period, services furnished [by persons or institutions having certain specified qualifications]."

[5] As indicated in the jurisdictional statement of appellant Metropolitan (84-325 J.S. 8-9 n.5), approximately half the states have now enacted mandated benefit statutes, state laws that require health insurance policies to provide coverage for a particular illness or condition. Under such statutes, any ERISA plan that purchases insurance is required to provide the mandated benefit.

In addition, a variety of other state laws attempt to affect the health benefits provided by insured ERISA plans. Some such laws

Appellants provide health insurance for employee benefit plans.[6] Following the enactment of ERISA and its broad preemption clause, appellants concluded that Section 47B could not properly be applied to employee benefit plans or to the health insurance policies they purchase. For this reason (among others), when an ERISA plan did not wish to include in its benefit package the benefits specified in Section 47B, appellants acquiesced and issued to that plan a policy that contained only the coverage desired. As a consequence, participants in such plans were not required to pay for the benefits mandated by Section 47B.

Massachusetts has not sought to enforce Section 47B to the extent it applies directly to ERISA plans. Appellee concedes that ERISA precludes direct state prescription of the benefits that must be provided by such plans (J.S. App. 43a, 59a). But, appellee maintains, and the court below held, states may nevertheless determine the benefits that insured ERISA plans must provide. They may do so, appellee contends, simply by dictating the content of health insurance policies available to ERISA plans. Thus, according to appellee and the court below, a state *may not* mandate the benefits to be provided by an uninsured ERISA plan but *may* mandate the benefits to be provided by an insured ERISA plan.

provide that if certain kinds of treatment are covered by health insurance, they must be covered regardless of the provider of the health services used. Others require that certain coverage be offered but not that it be purchased. A survey of the numerous state laws governing the content of health insurance policies is provided as an appendix to the brief submitted by the Health Insurance Association of America at the jurisdictional statement stage. Only mandated benefit statutes are at issue on this appeal.

[6] Among the ERISA plans covered by Metropolitan policies is General Electric Company's employee health insurance plan, which provides coverage to approximately one million persons nationwide. For many years, General Electric has observed a uniform benefits policy for all plan members. A. 99-100 (testimony of John Morris, a senior General Electric employee responsible for the company's insured health benefit plan).

Nowhere is it contended that the distinction between insured and uninsured plans comports with any statutory purpose or makes any sense. On the contrary, both appellee and the court below acknowledge that the distinction undermines important policies that ERISA sought to achieve—the promotion of uniform and solvent health plans. Nevertheless, the distinction is made because of the so-called "insurance savings clause" in ERISA, Section 514(b)(2)(A). That clause provides that nothing in the statute "shall be construed to exempt or relieve any person from any law of any State which regulates insurance * * *." 29 U.S.C. 1144(b)(2)(A).

While Massachusetts and the court below would reach the same result, each has adopted a different rationale, and each has rejected the reasoning of the other. Appellee's position has been that since Section 47B deals with insurance, it is automatically within the language of the savings clause and not preempted. The court below expressly rejected such an interpretation because it would "reach far into areas governed by ERISA, and thereby negate the unmistakable intent of Congress to work a broad preemption" (J.S. App. 21a). The court below held that the statute is not preempted because its subject matter, health benefits, is not expressly regulated by ERISA. The Commonwealth has not advanced this "conflict-based" argument, apparently because it is expressly refuted by this Court's holding in *Shaw* v. *Delta Air Lines*, 103 S. Ct. 2890 (1983).

Both appellee and the court below were unwilling to accept appellants' construction of the preemption and savings clauses. That construction would permit the states to regulate those areas of the insurer-insured relationship that states have traditionally regulated—for example, matters concerning the solvency, reliability, and

ethical conduct of the insurer—while not permitting the states to mandate health benefits whenever an ERISA plan purchases insurance. The latter form of state regulation was unknown when the savings clause was first included by Congress in the bills that ultimately led to ERISA.

B. Proceedings Below

This case began in June 1979, when appellee sued in state court for (i) a declaration that Section 47B can validly be applied to insurance policies sold to ERISA plans and (ii) an injunction directing appellants to comply with the statute. The trial court preliminarily enjoined appellants, during the pendency of the case, to provide the benefits mandated by Section 47B (J.S. App. 71a-84a; A. 57-59).

At trial, defendants stressed that state mandated benefit statutes, such as Section 47B,

(i) make it far more difficult to maintain uniform ERISA plans covering employees in different states;

(ii) significantly increase the cost of plan administration; and

(iii) force plan participants and plan sponsors to choose among (a) paying higher premiums to defray the additional cost of the new, mandated benefit; or (b) sacrificing other benefits that are already covered by the plan and that may well be more desirable than the mandated benefit; or (c) forgoing insurance altogether.

Defendants also observed that mandated benefit statutes improperly induce insured employee benefit plans to drop their insurance and become self-insurers, thus threatening the financial security of ERISA plans.

Notwithstanding these arguments, the Superior Court sustained the validity of Section 47B and granted the injunction sought by the Commonwealth (J.S. App. 36a-62a). Without explanation, the court stated that Section 47B "is not preempted by * * * ERISA" (*id.* at 57a).

On direct appeal, the Supreme Judicial Court of Massachusetts affirmed, although not on the ground advocated by the Commonwealth (J.S. App. 13a-34a). The court rejected appellee's simplistic contention that Section 47B "regulates insurance" and therefore is automatically saved from ERISA preemption by the insurance savings clause. In the court's view, such a literal reading of the savings clause would allow the states to defeat the clear congressional intent to "work a broad preemption" (J.S. App. 21a). The court agreed only that "the language of the savings clause is broad enough to *permit* a construction that would exempt § 47B from preemption" (*id.* at 21a-22a; emphasis added).

As stated in its original decision, the Supreme Judicial Court's prinicipal reason for upholding Section 47B was that the state law deals with the "substantive content" of employee benefit plans, not with the disclosure requirements and fiduciary standards for plan administrators imposed by ERISA. The court explained (J.S. App. 22a; citations and footnote omitted):

> Congress, when it enacted ERISA, was concerned with widespread abuses in plan administration, often resulting in employees' losses of anticipated benefits. In response, Congress enacted rules governing disclosure and fiduciary conduct by administrators of welfare benefit plans. Section 47B has no bearing on the problem of administrative abuse, and does not overlap or interfere with the means chosen by Congress to deal with such abuse. Section 47B affects only the substantive content of plans—a subject completely untouched by ERISA's regulatory

provisions. Therefore, nothing in the practical relationship between the two statutes calls for an implied limitation on the phrase "regulates insurance" that would exclude § 47B from the protection of the savings clause.

The court thus believed that questions of ERISA preemption ultimately can be determined only by considering the extent of actual practical conflict between federal and state law.

Metropolitan and Travelers appealed to this Court, contending that the Massachusetts court erred in permitting its preemption decision to turn on the asserted lack of conflict between Section 47B and the substantive regulations in ERISA. This Court vacated the judgment of the Massachusetts court (J.S. App. 10a-12a), and remanded for reconsideration in light of *Shaw* v. *Delta Air Lines*, *supra*. *Shaw* held that ERISA preemption is broad and does not depend on the existence of conflict between a state statute and federal regulatory provisions. 103 S. Ct. at 2900.

On remand, the Supreme Judicial Court adhered to its earlier decision and rationale (J.S. App. 1a-8a). The court acknowledged that this Court might reach a different result, but it "decline[d] to anticipate such a ruling" (*id.* at 4a). The state court refused to accept *Shaw*'s plain statement that the exceptions to ERISA preemption are "narrow." Instead, it labeled that aspect of the *Shaw* opinion "dictum" and sought to distinguish between the "exemption" from ERISA coverage considered in *Shaw* and the "exception" to ERISA preemption found in the insurance savings clause (*ibid.*).

The Massachusetts court conceded that this Court in *Shaw* rejected the argument that ERISA's broad preemption provision preempts only those state laws that actually conflict with ERISA's substantive regulations (J.S. App. 5a). Nevertheless, the state court held, such a "conflict-based analysis" remains appropriate for interpreting the insurance savings clause (*ibid.*).

The Massachusetts court acknowledged that, in enacting ERISA, Congress intended "to preclude the States from mandating employee benefits" and "to enable interstate employers to maintain uniform plans" (J.S. App. 5a-6a). The court held, however, that this congressional intent "is inconsistent * * * with the broad language of the insurance exception" (*id.* at 6a). Accordingly, the court refused to change its earlier decision and expressly ruled that a state can "mandate employee benefits indirectly through its insurance laws" (*ibid.*).

Justice Wilkins dissented. He took the position that, under *Shaw*, the exceptions to ERISA preemption should be read narrowly, lest a multistate employer be denied the opportunity to maintain a uniform ERISA plan (J.S. App. 8a). Justice Wilkins concluded that Section 47B is not a law that "regulates insurance" within the meaning of ERISA's savings clause. Rather, the dissenting justice wrote, "Section 47B represents precisely that form of local intrusion on ERISA covered benefit plans that ERISA intends to prevent" (*ibid.*).

SUMMARY OF ARGUMENT

This case concerns the proper interaction between ERISA's preemption clause and its insurance savings clause. The task is to read both provisions together so as to give effect to each and serve the purposes of Congress in enacting ERISA.

The first important proposition is that ERISA's preemption clause is extremely broad. Congress rejected narrower alternatives and deliberately sought to occupy the regulatory field fully. ERISA preemption extends beyond the subjects actually regulated by the federal statute and does not depend on a showing of conflict with a federal regulatory provision. These points have already

been established by decisions of this Court. *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981); *Shaw* v. *Delta Air Lines*, 103 S. Ct. 2890, 2899-2901 (1983).

The corollary is that the exceptions to ERISA preemption are narrow. Congressional sponsors of the Act in both the House and Senate made this point explicitly, and this Court confirmed it in *Shaw*. 103 S. Ct. at 2903. The insurance savings clause is one of these narrow exceptions.

Appellee would have the insurance exception swallow the preemption rule. If appellee's position were accepted, states could dictate the entire content of insured ERISA plans, through the simple expedient of prescribing the content of insurance policies that the plans could purchase. The states would thus be able to accomplish indirectly what they clearly are prohibited from accomplishing directly, *i.e.*, regulation of the content of ERISA plans. That is just the sort of indirect regulation that this Court refused to permit in *Alessi*. 451 U.S. at 525.

Moreover, if mandated benefit statutes like Section 47B are not preempted, they will increase costs and severely hamper the efforts of multistate employers to maintain uniform ERISA plans. They will also override the decisions of employers and employees and force plans to choose either increased costs, or abandonment of desired benefits, or surrender of the security of insurance. Each of these alternatives is inconsistent with the congressional scheme reflected in ERISA.

Congress sought to foster uniformity of multistate ERISA plans, as this Court explicitly held in *Shaw*. 103 S. Ct. at 2904 & n.25. Moreover, Congress chose to leave benefit selection to private determination by ERISA plan participants. *Id.* at 2897; *Alessi* v. *Raybestos-Manhattan, Inc.*, *supra*, 451 U.S. at 511.

Finally, Congress never intended to encourage ERISA plans to shift away from insurance. ERISA makes clear that no distinction is to be drawn between uninsured plans—which appellee concedes it cannot regulate—and insured plans. Such a distinction undermines the statutory purpose since it induces plans to have less financial security and thus places at risk the very benefit payments Congress sought to protect.

None of this is disputed. There remains, however, the language of the insurance savings clause. Congress saved from preemption "any law of any State which regulates insurance * * *." Massachusetts stresses this provision and argues that whatever the consequences may be, state laws such as Section 47B must survive. The savings clause, however, cannot be read as broadly as Massachusetts would read it, because such a reading would effectively read the preemption clause out of ERISA and would run directly counter to Congress' purposes in enacting the statute.

To give vitality to both the savings clause and the preemption clause, the former should be construed to refer to the wide variety of traditional forms of state insurance regulation, which are designed to protect the insurance purchaser from overreaching or excessive risk-taking by insurance carriers. These state laws govern such matters as the licensing and examination of insurance brokers and agents, the sales and advertising practices of insurers, the nature of permissible insurance company investments, and the level of reserves needed to guarantee insurance companies' solvency.

State laws of this kind—not laws intended to force ERISA plans purchasing insurance to provide certain specified benefits to plan participants—were doubtless what Congress had in mind when the savings clause was drafted. The savings clause appears in ERISA's predecessor bills at least as early as 1970, and we have found no mandated benefit statute enacted before 1971.

There is no evidence that Congress ever considered such statutes.

By interpreting the savings clause to cover traditional forms of state regulation, but not to permit state determination of the benefits to be provided by insured ERISA plans, appellants would give substantial effect to both the savings clause and the preemption clause. That is a far more rational way of reconciling the two provisions than by allowing the states to evade the preemption clause and regulate the most important aspect of an ERISA plan.

ARGUMENT

I. ERISA PREEMPTION IS UNUSUALLY BROAD, AND THE EXCEPTIONS TO PREEMPTION ARE NARROW

There can be no question concerning the breadth of ERISA's preemption clause. It is a "virtually unique preemption provision." *Franchise Tax Board* v. *Construction Laborers Vacation Trust*, 103 S. Ct. 2841, 2854 n.26 (1983). The clause's language, its history, and its construction by this Court establish that it is as broad as the English language permits. Appellee does not contend otherwise.

Although this issue is settled, we nevertheless review the reasons for construing the preemption clause so broadly. We do so because the scope of any exception to preemption—such as the savings clause—cannot be determined in a vacuum. The proper determination of this case requires reading the preemption and savings clauses together to give each vitality and fulfill the legislative purpose.

A. The Special Breadth of ERISA Preemption

1. *The language of the statute*

Section 514(a) of ERISA provides that the federal statute "shall supersede any and all state laws insofar as

they may now or hereafter relate to any employee benefit plan * * *." This is extremely broad language. The use of the phrase "relate to" reveals a congressional desire to sweep broadly and to cover all state laws having any connection, association, or reference to employee benefit plans.

2. *The legislative history of the preemption clause*

The breadth of ERISA's preemption clause is reinforced by the statute's legislative history. During the legislative consideration of the bills that led to ERISA's enactment, the House and Senate each passed preemption provisions that were substantially narrower than Section 514(a) as it appears today. Both the House and the Senate provisions provided that a state law would be preempted only if it related to subjects actually regulated by the federal statute; in effect, preemption was to require a conflict between federal and state law. The House provision referred to

> any and all laws of the States * * * insofar as they may now or hereafter relate to the reporting and disclosure responsibilities, and fiduciary responsibilities of persons acting on behalf of any employee benefit plan * * * [or] to the nonforfeitability of participant's benefits in employee benefit plans * * *, the funding requirements for such plans, the adequacy of financing of such plans, portability requirements for such plans, or the insurance of pension benefits under such plans.

120 Cong. Rec. 4742 (1974). The Senate provision stated that the new act would "supersede any and all laws of the States * * * insofar as they may now or hereafter relate to the subject matters regulated by" federal law. *Id.* at 5002.

When the House and Senate bills went to conference, the Conference Committee rejected both versions and, in their stead, substituted what is now ERISA's preemption provision. The Committee's report indicated that the sub-

stitution was intended to broaden the preemption provisions in the House and Senate bills and to cover the full range of state laws that "relate to" any employee benefit plan. H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 383, reprinted in 1974 U.S. Code Cong. & Ad. News 4639, 5162.

The comments in the Conference Committee report were reaffirmed when the bill that emerged from conference was considered on the floor of the House and the Senate. Sponsors of the bill stressed the broad preemption provision and the rationale for the Conference Committee's action. They emphasized the provision's role in accomplishing important purposes of ERISA: promoting solvency and permitting plans to operate on a uniform basis throughout the nation.

For example, Representative Dent, one of the bill's sponsors and Chairman of the Subcommittee on Labor of the House Labor and Education Committee, explained:

> Finally I wish to make note of what is to many the crowning achievement of this legislation, the reservation to Federal authority [of] the sole power to regulate the field of employee benefit plans. With the preemption of the field, we round out the protection afforded participants by eliminating the threat of conflicting and inconsistent State and local regulation. * * *
>
> The conferees, with the narrow exceptions specifically enumerated, applied this principle in its broadest sense *to foreclose any non-Federal regulation of employee benefit plans.* Thus, the provisions of section 514 would reach any rule, regulation, practice or decision of any State * * * which would affect any employee benefit plan * * **.

120 Cong. Rec. 29197 (1974) (emphasis added).

Likewise, Senator Williams, another sponsor of the bill and Chairman of the Senate Committee of Labor and Public Welfare, stated:

> It should be stressed that with the narrow exceptions specified in the bill, the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans. This principle is intended to apply in its broadest sense to all actions of State or local governments, or any instrumentality thereof, which have the force or effect of law.

120 Cong. Rec. at 29933.

The legislative history of Section 514(a), therefore, leaves no doubt that Congress sought to enact an extremely broad preemption provision, one that would "foreclose any non-Federal regulation of employee benefit plans." 120 Cong. Rec. 29197 (1974) (remarks of Rep. Dent).

3. The relation of the preemption clause to ERISA's purpose

As the comments of ERISA's legislative sponsors make clear, one of the congressional goals underlying ERISA was to relieve employee benefit plans of the burden of having to comply with varying regulations of the several states. This was essential, in Congress' view, to facilitate the maintenance of uniform multistate plans. The preemption provision was intended to help accomplish this end. As Representative Dent explained, only a broad provision, fully occuping the regulatory field, could "eliminat[e] the threat of conflicting and inconsistent State and local regulation." 120 Cong. Rec. 29197 (1974). Senator Javits, the ranking minority member of the Senate Committee and one of the bill's principal proponents, was even more explicit. He stated that broad preemption was required, to serve "the interests of uniformity with respect to interstate plans * * *." *Id.* at 29942.

Because ERISA's preemption provision was intended to avoid the possibility of subjecting employee benefit plans to conflicting regulations of several states, Congress chose not to tie the preemption clause to ERISA's substantive provisions. *Shaw* v. *Delta Air Lines*, 103 S. Ct. 2890, 2900 (1983). Preemption under ERISA does not depend on whether a state law involves subjects that ERISA itself regulates. It depends only on whether a state law "relates to" employee benefit plans. *Ibid.*

That is precisely the significance of the Conference Committee's rejection of the House and Senate preemption provisions in favor of a broader provision not bounded by the substantive content of ERISA. As shown above (see page 13, *supra*), the House and Senate provisions tied preemption directly to the subjects treated in the proposed federal statute. The Conference Committee rejected this approach, and instead adopted a provision that preempts any and all state laws that relate to employee benefit plans. Conflict with a federal regulatory provision is thus not a prerequisite for ERISA preemption of state law.

4. *This Court's decisions in* Alessi *and* Shaw

The Court has addressed ERISA's preemption clause on two previous occasions, and both times the Court has emphasized the clause's comprehensive character. In *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981), the Court held that by enacting ERISA's broad preemption clause, Congress "meant to establish pension plan regulation as exclusively a federal concern." The Court elaborated on the point two years later, in *Shaw* v. *Delta Air Lines, supra.*

Shaw held that "[t]he breadth of § 514(a)'s preemptive reach is apparent from that section's language. A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." 103 S. Ct. at 2899-2900 (footnote

omitted). As the Court observed in *Shaw*, referring to the legislative history canvassed above, "Congress used the words 'relate to' in § 514(a) in their broad sense" *Id.* at 2900. The preemptive scope of Section 514(a), the Court said, is "as broad as its language." *Id.* at 2901.

The Court expressly noted the Conference Committee's rejection of the conflict-based preemption provisions originally proposed and its adoption of a broader substitute. 103 S. Ct. at 2900-2901. In view of the Committee's deliberate expansion of ERISA preemption beyond those subjects directly regulated by the new statute, the Court held that Section 514(a) cannot "be interpreted to preempt only state laws dealing with the subject matters covered by ERISA—reporting, disclosure, fiduciary responsibility, and the like." *Id.* at 2900. It is thus well established that ERISA preemption does not depend on whether a state law conflicts with ERISA's regulatory provisions. The appropriate inquiry is simply whether the law "relates to" employee benefit plans. In holding otherwise, the decision below is plainly wrong.

5. *Decisions of the lower federal courts*

If any further support for the breadth of ERISA's preemption is needed, it can readily be found in a large number of decisions by the lower federal courts, both before and after *Shaw*. See, *e.g.*, *Champion International Corp.* v. *Brown*, 731 F.2d 1406, 1408-1409 (9th Cir. 1984); *Russell* v. *Massachusetts Mutual Life Insurance Company*, 722 F.2d 482, 487 (9th Cir. 1983), cert. granted, 105 S. Ct. 81 (1984); *Stone and Webster Engineering Corporation* v. *Ilsley*, 690 F.2d 323, 328-329 (2d Cir. 1982), aff'd, 103 S. Ct. 3564 (1983); *Azzaro* v. *Harnett*, 414 F. Supp. 473, 474 (S.D.N.Y. 1976), aff'd, 553 F.2d 93 (2d Cir.), cert. denied, 434 U.S. 824 (1977); *Hewlett-Packard Co.* v. *Barnes*, 425 F. Supp. 1294, 1298-1300 (N.D. Cal. 1977), aff'd, 571 F.2d 502 (9th Cir.),

cert. denied, 439 U.S. 831 (1978); *National Carriers' Conference Committee* v. *Heffernan*, 454 F. Supp. 914, 917 (D. Conn. 1978). All of these cases establish that Congress sought to occupy the regulatory field fully and to leave no room for supplementary state regulation.

Moreover, the lower federal courts have recognized that ERISA preemption does not depend on the substantive scope of the federal statute. See, *e.g.*, *Bucyrus-Erie Company* v. *Department of Industry, Labor and Human Relations*, 599 F.2d 205 (7th Cir. 1979), cert. denied, 444 U.S. 1031 (1980); *Pervel Industries* v. *Connecticut Commission on Human Rights and Opportunities*, 468 F. Supp. 490 (D. Conn. 1978), aff'd, 603 F.2d 214 (2d Cir. 1979), cert. denied, 444 U.S. 1031 (1980). As Judge Sprecher wrote for the court of appeals in *Bucyrus-Erie*, "we do not think [Section 514(a)] can properly be limited to preempt only those state laws which are specifically related to employee benefit plans or which only relate to these plans by imposing requirements inconsistent with ERISA." 599 F.2d at 209. Likewise, in *Pervel Industries*, Judge Newman stressed that "Congress made a clear-cut decision not to identify various subjects on which state laws were to be preempted, but instead sought to avoid constant litigation over the scope of preemption by preempting, with certain specific exceptions, 'all' state laws insofar as they 'relate' to plans covered by ERISA." 468 F. Supp. at 492.

B. The Narrowness of the Exceptions to ERISA Preemption

The natural corollary of the breadth of ERISA's preemption clause is the narrowness of the exceptions to that clause. Here, too, the legislative history and this Court's prior consideration of the question foreclose fair dispute.

In describing the final version of Section 514 in floor debate, both Representative Dent and Senator Williams explicitly referred to "the narrow exceptions" specified

in the bill. 120 Cong. Rec. 29197, 29933 (1974). This Court in *Shaw* quoted that language, and stressed the narrowness of the exceptions to ERISA preemption. The Court said that Congress "creat[ed] only very limited exceptions to preemption." 103 S. Ct. at 2903. Similarly, the Court referred to "the combination of Congress' enactment of an all-inclusive pre-emption provision and its enumeration of narrow, specific exceptions to that provision * * *." *Ibid.*

To be sure, this Court's opinion in *Shaw* dealt specifically with statutory provisions other than the insurance savings clause.[7] But that does not mean, as the Massachusetts court asserted, that the Court's reference to the narrowness of the exceptions to ERISA preemption was dictum. Nor does it provide any justification for the Supreme Judicial Court's proposed distinction between "exemptions" from ERISA coverage and "exceptions" to ERISA preemption (J.S. App. 4a).

Both "exemptions" from ERISA coverage and "exceptions" to ERISA preemption have the same effect; they define the limited areas of permissible state regulation of employee benefit plans. This Court in *Shaw* reviewed the entire statutory scheme and concluded that ERISA's broad preemption contemplates only a few narrow exceptions. 103 S. Ct. at 2899-2906. The Court specifically spoke in terms of "exceptions" (*id.* at 2899, 2902, 2903); it did not attach any significance to the semantic distinction drawn by the Massachusetts court.

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[7] In particular, *Shaw* construed Section 4(b)(3) of ERISA, 29 U.S.C. 1003(b)(3), which exempts from coverage under the federal law "any employee benefit plan * * * maintained solely for the purpose of complying with applicable * * * disability insurance laws," and Section 514(d) of ERISA, 29 U.S.C. 1144(d), which provides that nothing in the statute shall "be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States * * *."

This Court's analysis of the breadth of ERISA preemption and the narrowness of the exceptions to that preemption was an integral part of the reasoning that led to the Court's holding with respect to the New York Human Rights Law in *Shaw*. The State attempted to defend that law by relying on Section 514(d) of ERISA and arguing that preemption of the Human Rights Law would impair a law of the United States, namely, Title VII of the Civil Rights Act of 1964. In deciding how broadly to construe Section 514(d)'s prohibition against impairment of federal laws, this Court was obliged to determine the proper scope of ERISA preemption and the proper role of the exceptions to that general rule. Far from dictum, the portions of the *Shaw* opinion quoted above represent this Court's definitive assessment of the interaction between ERISA's preemption provision and the limited number of qualifications created by Congress.

II. MANDATED BENEFIT STATUTES LIKE SECTION 47B UNDERMINE CONGRESSIONAL INTENT AND CANNOT BE RECONCILED WITH ERISA'S PREEMPTION SCHEME

Mandated benefit statutes like Section 47B are inconsistent with ERISA's broad preemption provision and undermine congressional intent in several respects. First, mandated benefit statutes would permit states to dictate the substantive content of insured employee benefit plans, notwithstanding Congress' clear decision to remove the states from the regulatory scheme. Second, by allowing precisely the kind of multiplicitous, potentially conflicting state regulation that ERISA's preemption provision was designed to avoid, mandated benefit statutes severely handicap efforts by employers and employees to maintain uniform interstate benefit plans. Third, mandated benefit statutes improperly override private choice regarding the content of ERISA plans, notwithstanding the congressional decision to leave such matters to the private sector. Finally, as already noted,

mandated benefit statutes tend to encourage employee benefit plans to become self-insurers, because that is the only way in which such plans can avoid state interference with their substantive content. This alternative, however, threatens the financial security of ERISA plans and jeopardizes the payment of benefits to employees and their dependents. We consider each of these problems in turn.

A. The Effective Nullification of ERISA's Preemption Clause

It is undisputed that ERISA's preemption clause prevents states from directly dictating the content of employee benefit plans. That is why Massachusetts has not sought to enforce Section 47B to the extent it applies directly to ERISA plans. It is also true, however, that if Section 47B is sustained, Massachusetts and other states will be able to prescribe, with as much detail and specificity as the state legislatures choose, the entire benefit package to be provided by insured employee health plans. Indeed, under the holding below and under the reasoning of appellee, state regulation could go far beyond the benefit package.

Mandated benefit statutes represent an attempt by the states to do indirectly what they are precluded from doing directly. That is contrary to this Court's ruling in *Alessi*. *Alessi* invalidated a New Jersey workers' compensation law on the ground that its prohibition against reducing pension plan benefits by amounts received as workers' compensation was inconsistent with the congressional decision in ERISA to leave the matter to private determination and thus to allow such "integration" of benefits. The case held that ERISA preemption extends even to state laws that seek to regulate employee benefit plans indirectly. The Court stated: "[E]ven indirect state action bearing on private pensions may encroach upon the area of exclusive federal concern" (451 U.S. at 525).

Here, Massachusetts plainly intended to regulate the content of employee benefit plans. Materials prepared by the Massachusetts legislature in connection with Section 47B show that the statute's purpose was to make mental health care more readily available to all state residents, and to increase the revenues recoverable by the Commonwealth for that care. General Court Joint Committee on Insurance, *Advances in Health Insurance in Massachusetts* (August 1974), reprinted in A. 426-468, and summarized in J.S. App. 52a-53a. The statutory provision governing health insurance policies was merely one means to that end; the Commonwealth was seeking to improve access to mental health care, not to regulate insurance.

Section 47B is addressed explicitly to employee benefit plans, not merely to insurance policies. By ignoring the portion of the statute that is concededly unenforceable and defending the remainder as if it were a simple insurance statute, appellee seeks to justify state control over the benefits provided by insured plans. Appellee is thus trying to accomplish indirectly what it cannot accomplish directly. That is exactly what this Court refused to permit in *Alessi*.

With respect to insured plans, appellee's argument here means that the result reached in *Alessi* could actually be reversed through action by a state legislature. A state law could require that an insurance policy covering an employer's workers' compensation obligations contain a provision forbidding the offset of benefits payable under that policy against benefits due to an employee under a retirement or pension plan. Under the reasoning of the Supreme Judicial Court, such a state law would not be preempted by ERISA, even though it would accomplish precisely the result found unacceptable by this Court in *Alessi*.

Because Massachusetts cannot directly compel ERISA plans to provide specific health benefits, it should not be permitted to achieve that result indirectly. As this Court wrote in *Alessi* (451 U.S. at 525), "ERISA's authors clearly meant to preclude the States from avoiding through form the substance of the pre-emption provision."

B. Increased Costs and Difficulties in Maintaining Uniform Multistate Plans

Congress chose the broad preemption approach to foster uniformity and solvency in employee benefit plans. It sought to eliminate the potential for increased costs and regulatory variation arising from state law.

Both ERISA's legislative history and this Court's decision in *Shaw* confirm the point. This Court said that "[b]y establishing benefit plan regulation 'as exclusively a federal concern,' * * * Congress minimized the need for interstate employers to administer their plans differently in each State in which they have employees." 103 S.Ct. at 2904, quoting *Alessi* v. *Raybestos-Manhattan, Inc.*, *supra*, 451 U.S. at 523. See also the comments of ERISA's sponsors at pages 14-15, *supra*.

Following *Shaw*, other federal courts have acknowledged the congressional purpose to encourage uniformity among multi-state plans. See, *e.g.*, *Champion International Corp.* v. *Brown*, *supra*, 731 F.2d at 1409; *Russell* v. *Massachusetts Mutual Life Insurance Company*, *supra*, 722 F.2d at 487 ("the broad preemptive language of section [514 was] intentionally designed to provide complete protection to plan funds and participants by establishing national uniformity in the regulation of employee benefit plans"). See also *Stone and Webster Engineering Corp.* v. *Ilsley*, *supra*, 690 F.2d at 329. As Senator Javits said, ERISA preemption was designed to advance "the interests of uniformity with respect to interstate plans * * *." 120 Cong. Rec. 29942 (1974).

The court below agreed that Congress intended "to preclude the states from mandating employee benefits" (J.S. App. 6A). Nevertheless, the court decreed, that intent "is inconsistent * * * with the broad language of the insurance exception." (*Ibid.*) For this reason, the state court declined to find preemption, even though that decision clearly diminished the ability of multistate employers to maintain uniform ERISA plans. The court thus subordinated one of Congress' principal goals in ERISA—encouraging uniform interstate plans—to a provision of the Act that was intended merely to provide a narrow exception to the preemption rule.[8]

If mandated benefit statutes are sustained, nationwide plans seeking uniformity will have only two alternatives: either give up insurance altogether or adopt a single national policy that, at vastly increased expense, provides for all employees the most generous of each of the mandated benefits required by one or more states (assuming, of course, that no such minimum requirements conflict with each other). One law review article has described this dilemma very well:

> If states are permitted to require employee benefit plans to provide substantive benefits under the guise of insurance regulation, the result may be a Hobson's choice for employer or labor and management negotiators: either abandon the funding of benefit plans through insurance policies or be willing to accept all-encompassing uniform national contracts. For if each state may impose its own substantive terms on the plan, the only way uniformity may be reached is by incorporating into the plan all of the benefits each state requires. This dilemma is clearly of the type that Congress sought to avoid by enacting ERISA's preemption provisions, which were formulated to relieve interstate employee benefit plans of the adverse effects of cumulative or inconsistent state regulation.

Hutchinson and Ifshin, *Federal Preemption of State Law Under the Employment Retirement Income Security Act of 1974*, 46 U. Chi. L. Rev. 23, 68-69 (1978).[9]

Shaw reached an identical conclusion in the context of the state fair employment laws that were directly at issue there. The extended discussion in note 25 of this Court's opinion closely parallels the academic comments reproduced above (*see* 103 S. Ct. at 2904 n.25). Because of the significance of this point, we reproduce the Court's footnote in full:

> An employer with employees in many States might find that the most efficient way to provide benefits to those employees is through a single employee benefit plan. Obligating the employer to satisfy the varied and perhaps conflicting requirements of particular state fair employment laws, as well as the requirements of Title VII, would make administration of a uniform nationwide plan more difficult. The employer might choose to offer a number of plans, each tailored to the laws of particular States; the inefficiency of such a system presumably would be paid for by lowering benefit levels. Alternatively, assuming that the state laws were not in conflict, the employer could comply with the laws of all States in a uniform plan. To offset the additional expenses, the employer presumably would reduce wages or eliminate those benefits not required by any State. Another means by which the employer could retain its uniform nationwide plan would be by eliminating classes of benefits that are subject to state requirements with which the employer is unwilling to comply. ERISA's comprehensive pre-emption of state

[8] As we show at pages 34-36, *infra*, the savings clause can be construed to protect broad areas of state regulation, without effectively nullifying the preemption clause.

[9] The Hutchinson and Ifshin article was cited with approval in this Court's opinion in *Shaw*. 103 S.Ct. at 2901 n.19.

law was meant to minimize this sort of interference with the administration of employee benefit plans.

Shaw thus provides strong support for appellants' position in the present case. The Congress that tried to encourage uniformity and promote solvency could hardly have intended that the only means of accomplishing that end would be either self-insurance or comprehensive compliance with all the various and shifting positions of state legislatures that choose to enact mandated benefit laws.

If a multistate plan does not adopt one of the foregoing alternatives, Section 47B and other mandated benefit statutes will produce disparate treatment of employees covered by the same health plan, depending on the state in which they reside. Plainly, as footnote 25 in *Shaw* observes, this would entail substantial administrative expense. A senior employee responsible for administering General Electric's ERISA plan testified that mandated benefit statutes could increase General Electric's annual administrative costs by $25 million (A. 115-116), and the trial court expressly found that "[m]andated benefit laws do impose an administrative burden" (J.S. App. 54a).

Moreover, the disparate treatment of employees of a single employer, perhaps working at a single plant, is bound to produce serious practical problems. Consider, for example, an employer's insured health plan, covering employees at a single plant, some living in Massachusetts and some living in Rhode Island. The plan would be required to provide minimum coverage for the treatment of the mental and nervous conditions of the Massachusetts residents, but no such coverage would be required for the Rhode Island residents. As the trial testimony of an experienced administrator of ERISA plans showed (A. 81), such inequalities inevitably lead to employee dissatisfaction and complaints about the benefit plan. The

problems thus created are particularly acute for employers with many employees whose jobs require them to move frequently from one state to another.

C. Overriding Private Choice

Another important aspect of the congressional scheme underlying ERISA was the decision to leave the substantive content of employee welfare and pension plans to private determination. The legislative history on this point is clear, as we show below. Moreover, in both *Alessi* and *Shaw*, this Court noted Congress' decision to leave benefit selection to private choice. See 451 U.S. at 511; 103 S. Ct. at 2897. Neither appellee nor the court below has disputed the point.

Mandated benefit statutes like Section 47B, however, displace the private choices of an ERISA plan's participants and sponsors. They impose added costs and require that plan participants either agree to increased premiums or sacrifice one or more benefits already included in their ERISA package. Either way, private choice is overridden, and employees' reasonable expectations are disappointed.[10]

ERISA was largely motivated by the congressional desire to avoid abuses in employee pension plans. Through

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[10] The trial testimony of James M. Dawson, the administrator of several craft union health and welfare funds, provided a specific example of this situation. Referring to one of the funds he administers, Mr. Dawson testified that because of a state mandated benefit statute, union members "felt they could not afford to pay for the benefits required by that statute and still keep all the benefits they had in their own particular plan" (A. 76). The net result, Mr. Dawson testified, was that the union members were compelled to make eligibility for plan benefits more restrictive and to "eliminate[] all vision and dental care under their package in order to meet the requirements of the state mental health law" (A. 76-77). This caused great dissatisfaction among the members, who wished to retain visual and dental benefits and to liberalize eligibility for coverage under the plan, and who did not want to pay for expanded mental health coverage (A. 77-78).

several years of study and investigation, Congress had learned of pension plan abuses in which employee benefits were lost because of very restrictive vesting rules, or inadequate plan funding, or employer bankruptcies. Congress sought to remedy these problems in ERISA. It did so by enacting detailed provisions concerning the vesting of pension rights, the funding for pension plans, the requirement for insurance against plan termination, disclosure of pension plan provisions, the fiduciary responsibility of pension plan administrators, and the portability of pension plan rights. By these means, Congress sought to ensure that pension benefits earned would actually be realized. See, *e.g.*, 120 Cong. Rec. 29192 (1974) (remarks of Rep. Perkins); *id.* at 29944 (remarks of Sen. Javits).

Congress did not, however, require employers to maintain pension plans, and it did not prescribe the kind of benefits that pension plans must provide. Those matters were left to private decision. Throughout the consideration of ERISA, Congress was acutely aware of the need to avoid making pension plan administration so burdensome that it would significantly diminish the likelihood that employers would offer pension plans. The Senate Committee Report, for example, stated:

> The Committee believes that the legislative approach of establishing minimum standards and safeguards for private pensions is not only consistent with retention of the freedom of decision-making vital to pension plans, but in furtherance of the growth and development of the private pension system. * * *
>
> The Bill reported by the Committee represents an effort to strike an appropriate balance between the interests of employers and labor organizations in maintaining flexibility in the design and operation of their pension programs, and the need of the workers for a level of protection which will adequately protect their rights and just expectations.

S. Rep. No. 127, 93d Cong., 1st Sess. 13 (1973), reprinted in 1974 U.S. Code Cong. & Ad. News 4849-4850. It was thus absolutely clear at all times that the decision to offer pension plans and the substantive content of such plans were completely left to bargaining between employers and employees.

This Court has already recognized the point. Referring to the content of benefits provided under ERISA pension plans, the Court held in *Alessi* that "ERISA leaves this question largely to the private parties creating the plan." 451 U.S. at 511. In the Court's words, "the private parties, not the Government, control the level of benefits * * *." *Ibid.*

A recent Sixth Circuit decision provides further support for the importance of private choice. In *Moore* v. *Reynolds Metals Company Retirement Program For Salaried Employees*, 740 F.2d 454, 456 (6th Cir.), pet. for cert. filed, No. 84-740 (Nov. 3, 1984), the court of appeals stressed that "an employer has no affirmative duty to provide employees with a pension plan. In enacting ERISA, Congress continued its reliance on *voluntary* action by employers" (emphasis in original, citation omitted).

The point applies to employee health plans as well as pension plans. ERISA draws no distinction in this regard. As this Court noted in *Shaw* in the context of ERISA health plans, "ERISA does not mandate that employers provide any particular benefits * * *." 103 S. Ct. at 2897. The substantive content of health plans, like pension plans, was left to private parties.

Although Congress decided that neither it nor the states should be involved in the business of dictating plan benefits, mandated benefit statutes like Section 47B overrule the choices of the private sector and subject the content of employee benefit plans to public control. The states should not be permitted to circumvent the congressional decision in the guise of regulating insurance.

D. The Tendency to Encourage Self-Insurance

If the decision below stands, there will be only one way for ERISA plans to avoid the effect of mandated benefit statutes. They can forgo insurance and become self-insurers.

ERISA itself, however, draws no distinction between insured and uninsured plans. On the contrary, Section 3(1) of the Act, 29 U.S.C. 1002(1), explicitly includes within the definition of "employee welfare benefit plan" plans that provide benefits "through the purchase of insurance or otherwise."

By imposing additional burdens on insured plans only, mandated benefit statutes provide an incentive for plans to forgo the purchase of insurance policies and to establish their own funds for the payment of employee benefit claims. The more onerous the benefits mandated by state laws, the greater the administrative and premium costs they impose, and the greater the incentive for employee health plans to forgo insurance. This will skew the financial support of employee benefit plans in a way never intended by Congress, will threaten the plans' financial security, and will increase the likelihood that individual plans will not have sufficient funds available to fulfill their obligations to sick or injured employees.[11]

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[11] In fact, as mandated benefit statutes have proliferated, the number of self-insured employee benefit plans has grown dramatically. Munnelli, *Administrative Services Contracts*, 17 The Forum 987, 987 (1982). It is, at the least, a reasonable inference that these statutes have contributed to this trend. Uncontradicted testimony supporting this inference, and pointing out the relationship between mandated benefit costs and the attractiveness of self-insurance, was given by three trial witnesses. A. 83-85, 117, 189-191.

The experience of appellant Metropolitan is also instructive. In 1975, claims paid to beneficiaries of self-insured plans (for which Metropolitan provided only administrative services) amounted to approximately $20 million or 1.2% of the total group health claims paid by Metropolitan during that year. By 1983, the annual dollar figure for self-insured plans administered by Metropolitan had grown to more than $740 million, and these claims represented 15.2% of all group health claims paid by the company.

Moreover, the incentive toward self-insurance tends irrationally to favor large employee plans over small. Large plans are the ones more likely to have the funds necessary to take advantage of the self-insurance option, and thereby to avoid the cost of mandated benefits. Smaller plans, on the other hand, will be forced to purchase insurance and to bear the additional costs that mandated benefit laws entail.

Nothing whatsoever in the language or legislative history of ERISA suggests that Congress intended to make the states' power to regulate the substantive content of employee benefit plans turn on the size of the plan, or the plan's willingness or capacity to be a self-insurer. These factors bear no rational relationship to the legislative concerns underlying ERISA. The distinction produced by the Commonwealth's application of Section 47B and endorsed by the decision below therefore is inappropriate.

III. ALTHOUGH THE INSURANCE SAVINGS CLAUSE DOES NOT PERMIT THE STATES TO MANDATE THE BENEFITS PROVIDED BY ERISA PLANS, IT DOES PLAY A SIGNIFICANT ROLE IN THE STATUTORY SCHEME

We have demonstrated substantial inconsistencies between mandated benefit statutes on the one hand and ERISA's statutory purposes and preemption scheme on the other. Massachusetts does not really dispute these inconsistencies, but it argues that the insurance savings clause nevertheless protects Section 47B. We turn then to the proper interpretation of the savings clause, considered in the context of ERISA's broad preemption provision and Congress' purposes in enacting the statute. Three possible interpretations have been proposed in this case.

A. The Commonwealth's Position

First, the Commonwealth has argued that because Section 47B purports to regulate insurance, it is automatically protected from preemption by the savings clause. The Commonwealth simply points to the statutory words "any law of any State which regulates insurance" and rests its case. This literalistic approach was rejected by the Supreme Judicial Court in its earlier decision (J.S. App. 21a-22a), and was not even mentioned in the opinion on remand. It is an overly simple, mechanical approach that would permit the states to engage in virtually unlimited regulation of ERISA plans, as long as they couch their actions in terms of insurance regulation.

Prior to the decision in *Alessi*, the First Circuit sustained a New Hampshire statute similar to Section 47B, basically adopting the position now advocated by Massachusetts. *Wadsworth* v. *Whaland*, 562 F.2d 70 (1st Cir. 1977), cert. denied, 435 U.S. 980 (1978).[12] The decision in *Wadsworth* is unpersuasive essentially for the same reasons that the arguments of Massachusetts are unpersuasive. Both would permit the insurance exception to override the preemption rule. That cannot have been Congress' intent.[13]

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[12] Two other state courts have reached similar decisions. See *Metropolitan Life Insurance Co.* v. *Whaland*, 119 N.H. 894, 410 A.2d 635 (1979); *Insurance Commissioner* v. *Metropolitan Life Insurance Co.*, 296 Md. 334, 463 A.2d 793 (1983).

[13] The court of appeals in *Wadsworth* also devoted attention to the so-called "deemer" clause in Section 514(b)(2)(B) of ERISA, which provides that an employee benefit plan shall not "be deemed to be an insurance company or other insurer, * * * or to be engaged in the business of insurance * * * for purposes of any law of any State purporting to regulate insurance companies, [or] insurance contracts * * *."

Although the deemer clause does not directly address the proper interpretation of the insurance savings clause, it does provide some guidance here. It shows that Congress did not want states to avoid preemption through an overly broad construction of the savings clause. The deemer clause was obviously intended to prevent states from circumventing ERISA preemption by treating ERISA plans as insurers and using that ploy as a justification for state regulation of such plans. Similarly, the savings clause should not be interpreted to permit the states to use the pretext of "insurance regulation" as a means of dictating the benefits to be provided by ERISA plans.

B. The Supreme Judicial Court's Approach

Having rejected the Commonwealth's position, the Supreme Judicial Court offered a second possible interpretation of the insurance savings clause. The court held that a state law purporting to regulate insurance will not be preempted unless it conflicts with ERISA's substantive provisions. The court thus tried to resolve the tension between the rule and the exception by deferring in all cases to the exception, absent a showing that such deference would raise a direct conflict with ERISA's regulatory provisions.

This approach is contrary to the well-established principle that ERISA preemption does not depend on conflict with ERISA's regulatory provisions. *Shaw* v. *Delta Air Lines, supra*, 103 S. Ct. at 2900. That was precisely the kind of test that Congress rejected when the Conference Committee adopted its substitute for the earlier preemption proposals of the House and the Senate. Those proposals were explicitly tied to "the subject matters regulated by" the new federal law. See page 13, *supra*. Congress replaced them with the much broader provision in Section 514(a). There is no justification for disregarding this fundamental feature of ERISA's preemption clause, merely because one of the narrow exceptions to that clause is arguably implicated.

As Justice Wilkins correctly recognized in dissent below, "Congress has adopted an all-inclusive preemption scheme, and it is now clear, in light of the *Shaw* opinion, that it is irrelevant whether State law dictating plan benefits conflicts with the substantive policies of ERISA" (J.S. App. 8a).

It is worth noting here that, although the approach followed by the court below purports to be more moderate than that pressed by appellee, it amounts in practice to very much the same thing. ERISA does not regulate the substantive content of employee benefit plans; that much is agreed. Accordingly, by simply mandating particular coverage to be provided, no state statute could possibly conflict with ERISA's regulatory provisions, in the direct sense required by the court below as a precondition for preemption. ERISA does not deal with the subject, and therefore, under the "conflict-based" approach of the court below, as well as under appellee's absolutist approach, the states would be completely free to dictate the content of insured ERISA plans, to overturn the result in *Alessi* (see page 22, *supra*), and to regulate plans in many other ways.

C. Appellants' Proposal for Giving Effect to Both the Preemption Clause and the Savings Clause

There is a third possible interpretation of the savings clause. It would give full effect to the language of the clause, without surrendering to the states the broad regulatory power over employee benefit plans that was denied them by the preemption clause. That is the approach advocated by appellants.

The preemption and savings clauses can be sensibly reconciled by construing the latter to include the wide range of state laws designed to protect the insurance purchaser from improper or imprudent conduct by the insurance company—but not those state laws whose purpose and effect is to control plan content or the relationship between the plan itself and the plan's beneficiaries. The state laws that should be saved from preemption are those falling within the traditional areas of state insurance regulation, such as: the licensing and examination of insurers, agents, and brokers; the specification of standards of conduct for sales and advertising; the prescription of criteria governing investment of funds; mini-

mum capital and surplus requirements; requirements that adequate policy reserves be maintained; the setting of character standards for insurance company management; general oversight of insurance companies by state insurance departments; and regular financial reporting by insurers. Such a construction of the savings clause was recently adopted in *Michigan United Food & Commercial Workers Unions & Food Employers Health & Welfare Fund* v. *Baerwaldt*, 572 F. Supp. 943, 950-952 (E.D. Mich. 1983), appeal docketed, No. 83-1570 (6th Cir. Aug. 16, 1983). See also *Bell* v. *Employee Security Benefit Association*, 437 F. Supp. 382, 391 (D. Kan. 1977) (holding that the "primary purposes of insurance regulation" are to avoid overreaching by insurers, to assure their stability and solvency, and to assure that rates and rate classifications are reasonable and fair). By focusing on the kinds of insurance regulation in which the states have traditionally engaged, this approach permits state regulation in the areas that Congress almost certainly had in mind when it enacted the insurance savings clause. It does so without significantly affecting the operation of ERISA plans.

Although there may be cases in which reconciliation of the preemption clause and the savings clause poses difficult line-drawing problems, this is not such a case. Here, the consequences of accepting appellee's interpretation of the savings clause are so extreme and so inconsistent with ERISA's scheme that there should not be any serious question about the proper accommodation of the two provisions.

It is equally easy to provide examples of state statutes at the opposite end of the spectrum, *i.e.*, laws that plainly should be preserved under the ERISA savings clause. Several recent reported decisions have involved such laws, and appellants' approach would protect them from preemption. See, *e.g.*, *American Progressive Life and Health Insurance Company* v. *Corcoran*, 715 F.2d 784, 785-787

(2d Cir. 1983); *Wayne Chemical, Inc.* v. *Columbus Agency Service Corporation*, 567 F.2d 692 (7th Cir. 1977); and *Brink* v. *DaLesio*, 496 F. Supp. 1350, 1382 (D. Md. 1980), aff'd in part, rev'd in part, and remanded on other grounds, 667 F.2d 420 (4th Cir. 1981).

Among other things, *American Progressive* involved a New York insurance regulation that established a maximum commission for sales of life insurance on a mass merchandising basis to participants in pension funds; *Wayne Chemical* involved an Indiana insurance law forbidding the sale of insurance without a certificate of authority from the state's Commissioner of Insurance; and *Brink* involved a Maryland law that prohibited an insurer from cancelling a policy for non-payment of premiums if the premium due had been paid to the insurance broker. Each of these provisions was sustained against a preemption challenge; each offered protection to the insurance purchaser against possible overreaching by the insurance carrier.

Statutes like those described in the preceding paragraph illustrate the type of insurance regulation that traditionally has been reserved to the states. These statutes do not interfere with the operation of ERISA plans, and they have no effect on the nature or level of benefits offered by such plans. They are thus far different from mandated benefit statutes.[14]

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[14] Although appellants agree that the statutes described in the text are clearly not preempted by ERISA, appellants do not endorse some of the reasoning used by the courts in *American Progressive*, *Wayne Chemical*, and *Brink*. Those cases cite *Wadsworth* with approval and appear to proceed on the assumption that any state law that purports to regulate insurance is automatically saved from preemption. For the reasons already set forth, such an overly broad reading of the savings clause is incorrect. It is not needed to save from preemption the state laws described in the text. Under appellants' approach, these laws, as well as myriad other state statutes that regulate insurance, can be preserved from ERISA preemption, without at the same time surrendering regulation of insured ERISA plans entirely to the states.

We can be quite confident that Congress was not thinking of mandated benefit statutes when it enacted ERISA. As far as we have been able to determine, no such statute existed before 1971. But at least as early as March 1970, the insurance savings clause was already included in the bills that led to ERISA. Congress considered many such bills before ERISA finally was enacted in 1974, and the insurance savings clause was a constant feature in all of them, well before a single mandated benefit statute was enacted by any state.[15] See S. 3589, 91st Cong., 2d Sess. § 14 (1970), reprinted in 116 Cong. Rec. 7280, 7284 (1970); H.R. 16462, 91st Cong., 2d Sess. § 14 (1970), reprinted in 116 Cong. Rec. 7570, 7577 (1970). See also *Private Welfare and Pension Plan Legislation: Hearings on H.R. 1045, 1046, and H.R. 16462 Before the Subcomm. on Labor of the House Comm. on Education and Labor*, 91st Cong., 1st & 2nd Sess. 1, 12 (1976).[16]

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[15] In a footnote in the jurisdictional statement for appellant Metropolitan (84-325 J.S. 24 and n.13), we stated that four states enacted mandated benefit statutes before 1973, "when the insurance savings clause first appeared in the bills that led to ERISA." The statement that the insurance savings clause first appeared in 1973 was in error. That was the time at which the bills that were passed by the House and Senate and sent to the Conference Committee in 1974 were introduced. But predecessor bills had been before Congress for a number of years, and as indicated in the text, the insurance savings clause had made its appearance at least as early as March 1970.

[16] The insurance savings clause appeared in several other bills before ERISA was enacted. See, *e.g.*, S. 2, 92d Cong., 1st Sess. § 507 (1971), reprinted in *Welfare and Pension Plan Legislation: Hearings on H.R. 1269 before the Subcomm. on Labor of the House Comm. on Education and Labor*, 92d Cong., 1st Sess. 84 (1971); *id.* at 15, reprinting H.R. 1269, 92d Cong., 1st Sess. § 114 (1971); S. 3598, 92d Cong., 2d Sess. § 609(a)(2) (1972), reprinted in *Retirement Income Security for Employees Act, 1972: Hearings on S. 3598 before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 92d Cong., 2d Sess. 87 (1972); S. 4, 93 Cong., 1st Sess. § 609(a)(2) (1973), reprinted in *Retirement Income Security For Employees Act, 1973: Hearings before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare.*

It is hardly surprising then that there is no legislative evidence whatsoever suggesting that ERISA sought to preserve mandated benefit statutes or that Congress even knew about such statutes when it enacted the savings clause. Under these circumstances, there is no justification for adopting a broad construction of the clause that will produce results incompatible with the rest of the statute and with the underlying congressional purposes. The clause should be interpreted to effectuate the overall objectives of ERISA and at the same time to give effect to all the statutory language.

CONCLUSION

The judgment of the Supreme Judicial Court should be reversed.

Respectfully submitted,

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93d Cong., 1st Sess. 96 (1973); H.R. 2, 93d Cong., 1st Sess. § 114 (1973), reprinted in *Welfare and Pension Plan Legislation: Hearings on H.R. 2 and H.R. 462 before the Subcomm. on Labor of the House Comm. on Education and Labor*, 93d Cong., 1st Sess. 15 (1973).